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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 435

HARRY LEV,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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To the Honorable, the Chief Justices, and the Associate Justices of the Supreme Court of the United States:

Your petitioner Harry Lev respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on August 11, 1958. See Appendix, *infra*, p. 45. The Court of Appeals affirmed the judgment of the United States District Court for the Southern District of New York finding the petitioner guilty of a charge of conspiracy to violate Title 18, U. S. Code, Section 371.

OPINION BELOW.

The opinion of the Court of Appeals for the Second Circuit, dated August 11, 1958, is as yet unreported and is printed in appendix hereto, *infra*, p. 31.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on August 11, 1958. No petition for rehearing was filed. The time for filing a petition for certiorari was extended to October 10, 1958, by order of this Court entered September 9, 1958. The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. In determining the prejudicial effect of a variance between a charge of one conspiracy and proof of two separate and distinct conspiracies, should not the reviewing court examine the entire record in order to ascertain whether substantial rights have been affected?

2. Is the harmful effect of error resulting from a variance between a charge of one conspiracy and proof of two to be determined simply by considering whether the two conspiracies could have been joined in one indictment and by examination of the court's charge?

3. Can the error resulting from the variance of a charge between one conspiracy and proof of two be harmless in a long and complicated trial simply because the jury was admonished not to consider the evidence proving one of the conspiracies as to a defendant not participating in it? Are not such cautionary instructions ineffective to protect such a defendant?

4. Is the error arising from the charge of one conspiracy and proof of two cured by equivocal and ambigu-

ous instructions permitting a defendant to be bound by the acts and declarations of others participating in a conspiracy to which he was not a party?

5. Is it proper for a reviewing court to make an examination *in camera* of a sealed summary of a witness's prior statement to a government investigator furnished it by the prosecutor and of *ex parte* affidavits pertaining to the summary in order to determine whether the summary is discoverable under the provisions of Title 18 U. S. C., Section 3500, when no claim is made that it contained irrelevant or extraneous matter?

6. Are not summaries and reports of prior statements made by witnesses to a government investigator available to the defendant under the provisions of Title 18 U. S. C., Section 3500?

7. Does Title 18 U. S. C. Section 3500 provide the sole procedure by which such summaries and reports are to be made available to defendants?

STATUTES INVOLVED.

Title 18 U. S. C., Section 371:

> If two or more persons conspire to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 18 U. S. C., Section 3500:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than

the defendant) to an agent of the Government shall be subject of subpena, discovery or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its dis-

cretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement" as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Rules of Criminal Procedure:

Rule 52. Harmless Error and Plain Error.

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT.

The court below held that there was multiple but harmless error arising out of petitioner's conviction by a jury sitting in the Southern District of New York. The conviction was upon an indictment charging him together with eight other defendants with conspiracy to defraud the United States of its governmental functions of administration and procurement of governmental contracts free from partiality, obstruction, dishonesty and fraud and its right and interest in the conscientious and faithful services of certain employees of the New York Quartermaster Procurement Agency and the Armed Services Textile and Apparel Procurement Agency (hereinafter referred to respectively as NYQPA and ASTAPA) free from corruption, dishonesty, bias, hope of unlawful reward and fraud in violation of Title 18, U. S. Code, Sec. 371.

Three of the named conspirators, Major Farnell, Earnshaw and Porreca did not go to trial. The latter pleaded guilty and the other two were granted severances. Of the six defendants standing trial all but Pollack were convicted. He was acquitted.

The matters set forth in the one count charging conspiracy had all been aired before the McClellan Committee of the Senate (Permanent Subcommittee on Investigations of the Committee on Government and Operations, 84th Congress, First Session) in 1955, when it held hearings on textile procurement in the Military Services (R. 1528).

Petitioner, aware of the evidence there produced, consistently prior to and during the trial maintained that the government would attempt to prove at least two or more separate and distinct conspiracies under its one conspiracy

charge and that petitioner could at best be connected with but one.[1]

Petitioner's worst fears were realized when the government offered evidence as to conspiracies relative to the procuring and administration of (a) a 1952 contract to manufacture garrison hats for the Army (hereinafter referred to as the Bonita conspiracy) and (b) a 1953 contract to manufacture sailor hats for the Navy (hereinafter referred to as the White Hat conspiracy). The Government in the court below and the Court of Appeals concede petitioner had no connection whatsoever with the Bonita conspiracy. Petitioner's co-defendants, Rubin, Ades, Wool, Hort, Porreca were involved in both conspiracies.

In attempting to prove the Bonita conspiracy, the government proved thirty-three separate transactions with all of their ramifications, none of them admissible against petitioner. These transactions were five separate payments of money or delivery of property to defendant Porreca, a supervisor at NYQPA and ASTAPA (R. 457-463, 476-8, 510, 514, 518-19, 1137, 1188); nine separate payments of money or delivery of property to defendant Hort, a procurement clerk in NYQPA and thereafter a contract administration clerk in ASTAPA (R. 439, 466, 470, 481-496, 521, 532-8, 552-4, 568, 571); three separate payments of

1. Prior to trial petitioner filed a timely motion (a) to dismiss the indictment on the ground that the Grand Jury had before it no evidence which could justify the inference of a single conspiracy (b) in the alternative, for a separate trial on the ground that it was inconceivable that the jury would be able to differentiate the evidence admissible against him and the large amount of evidence inadmissible against other defendants alone; (c) for an inspection of the Grand Jury minutes in aid of determination by the Court of both alternative motions (R. 4429-4494). The motions were denied. (d) At the conclusion of the government's opening to the jury, he moved again for a dismissal of the indictment on the grounds that the opening indicated that the government proposed to prove not one but a number of conspiracies (R. 46).

money or delivery of property to Wool, a captain in the U. S. Air Force attached as a contracting officer at NYQPA and thereafter chief of a purchasing section of ASTAPA, and one payment of money to a third party for Wool's benefit (R. 503-4, 542-6, 550-1, 1142-6); five payments of money to defendant Pollack, an accountant at NYQPA and ASTAPA (R. 421-434, 486-496, 530, 533-8, 552-4); four payments of money to Farnell, a Major in the Army attached to NYQPA as a contracting officer (R. 422-3, 533, 487, 498, 496, 500, 533-8); one delivery of property to Earnshaw, a purchasing agent in NYQPA (R. 506) and, in addition, although they were not named as defendants, one payment of money to Ienni, a government inspector (R. 1337), one payment of money to one Schlesinger (R. 633-6), one offer to bribe one Watkins and two payments of money to a number of persons identified only as "people at Sixteenth Street" the headquarters of NYQPA and ASTAPA (R. 476-8, 525-6).

In support of the White Hat conspiracy, the government gave evidence which related to only six transactions, *i.e.*, one alleged payment to Wool (R. 610-612), the payment of money on one occasion (R. 617-620) and the purchase of clothing on another (R. 620) (R. 1599) for Hort, the payment of money on one occasion (R. 1249-1250) and the purchase of a ticket to dinner on another (R. 623-5) to Porreca, and the advance (repaid) of a trifling hotel bill for one Vinning (R. 1798-1800, 3062-3064).

Throughout the trial lasting approximately thirty-six days, petitioner repeatedly urged upon the trial court the dangers to him of such a mass trial and the inherent prejudice to him arising from the admission in evidence against the other defendants of acts and declarations bearing solely upon the Bonita conspiracy (R. 46, 103-116, 301, 402, 453-4, 461, 498, 500, 502, 515, 1077, 1157, 1190, 1212).

During the course of the trial the trial court first indicated that the case would go to the jury with an instruction that they must find *one* conspiracy (R. 46). At the conclusion of the Government's case he stated that although he thought there was enough to go to the jury on the *one* conspiracy theory, he would submit it to the jury with an instruction that petitioner had not entered the Bonita conspiracy (R. 1537, 1538, 1840, 1843-1846, 1886). In the interim, from time to time, the trial court instructed the jury that the government had the burden of establishing that there was *one* conspiracy; and if the petitioner was a member of that conspiracy, he would be chargeable as to the acts and declarations of the co-conspirators prior to the time he joined it (R. 103, 115, 402). He also told the jury during the trial that a conspiracy was a partnership in crime and the acts and declarations of one conspirator was binding on all others found to be co-conspirators (R. 100, 101, 483, 484, 540).

The Court of Appeals for the Second Circuit upon petitioner's appeal held that this variance between the charge in the indictment and proof was error but harmless on the theory that substantial rights of the petitioner were not affected.

In determining this question it stated that the test to be applied in the Second Circuit was whether the conspiracies ultimately proven could have been joined in a single indictment and whether the trial was conducted so as to protect the rights of defendants not common to all conspiracies.

During the course of the trial an important government witness, Carlin, testified to conversations among defendants Rubin and Ades and one Levy, during the course of which Rubin stated that he could obtain government contracts for Ades and Levy because of his connections with

NYQPA and that about 5% of the contract price would be needed as expenses to return favors that might be extended to him there. He also testified that Rubin had stated that these connections would see that he got contracts, that he could exercise some control over the selection of inspectors who would be assigned to examine the goods after manufacture and that he could get deviations from contract requirements, if needed (R. 306-316, 327-330).

During cross-examination and at its termination, the trial court was asked to direct the government to produce a statement which this witness stated he believed he had signed, and which he said he had given to Balaban and Poole, government investigators, concerning the events to which he had testified. The trial court denied these requests on the grounds that no proper foundation showing inconsistency had been laid (R. 342-3, 394-5).

Upon the appeal of this cause to the Court of Appeals (*Jencks* v. *United States* (1957), 353 U. S. 657, having been handed down by this Court in the meantime) the government transmitted to the court below a sealed envelope, the contents of which were never made available for the inspection and examination of petitioner and, of course, had never been produced at the trial for examination of the trial court, and is therefore not a part of the record here.

The prosecutor also furnished the court below with his affidavit; the affidavit of Balaban to the effect that he, together with Poole, had interviewed Carlin, that this was the only interview he "recalls" and that "upon information and belief" it was the only interview Poole had with the witness; and an unsworn letter from the acting counsel of the Senate Committee. No affidavit from Poole was submitted. The affidavits and letters are printed in the appendix hereto, *infra*, pp. 39-44.

Upon his appeal, petitioner, under the authority of the *Jencks* decision, urged that the trial court erred in refusing to direct the government to produce for him this statement. The Court of Appeals held this to be error also but harmless. It reached this conclusion by making an *in camera* examination of the contents of the sealed envelope and one of the affidavits, stating that the document therein contained was a summary of an interview with Carlin and therefore it could not be made available to petitioner on a new trial under the provisions of Title 18 U. S. C., Section 3500.

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION OF THE COURT BELOW OPENS THE WAY TO MASS TRIALS OF SEPARATE CONSPIRACIES UNDER ONE COUNT INDICTMENTS. IT PERMITS THE IMPROPER TRANSFERENCE OF GUILT, WIDENS THE CONSPIRACY DRAGNET AND IS IN CONFLICT WITH DECISIONS OF THIS COURT.

The first error as to petitioner found by the court below arose out of the occurrence of a variance between the single conspiracy charged and the proof of separate and distinct conspiracies, *i. e.*, the Bonita and White Hat conspiracies. *In dealing with this error the court below first admitted that "the courts have not evolved clear lines for distinguishing simple and multiple conspiracy situations."* As demonstrating this, the court below referred to three decisions of this Court, *Blumenthal* v. *United States* (1947), 332 U. S. 539; *Berger* v. *United States* (1935), 295 U. S. 78; and *Kotteakos* v. *United States* (1946), 328 U. S. 750.

It did not, however, apply these cases; but, under what it claimed was the test laid down in this type of situation in *United States* v. *Cohen* (1944) (2nd Cir.), 145 F. 2d 82, it concluded that the Bonita and White Hat conspiracies might have been joined in a single indictment, that the trial court's instructions were adequate to protect the rights of petitioner and that therefore his substantial rights had not been affected.

The decision of the court below indicates that it has disregarded the caveat of *Grunewald* v. *United States* (1957), 353 U. S. 391, that this Court will view with disfavor attempts to broaden the already pervasive and wide sweep-

ing nets of conspiracy prosecutions. Further, it is in conflict with decisions of this Court, as is hereinafter pointed out, and its action raises an important question in the administration of criminal justice in the federal courts.

A. In Failing to Examine the Entire Record to Determine Whether Petitioner's Substantial Rights Were Affected By the Variance Between the Charge and the Proof, the Court Below Is In Conflict With Decisions of This Court.

In the court below petitioner had contended that the testimony as to him had been confused with a vast amount of testimony relating to the Bonita conspiracy and that the trial court's instruction instead of effectively insulating him from the Bonita conspiracy only compounded that confusion.

Apparently, the court below did not consider petitioner's contentions for it is obvious from its opinion that no effort was made to determine whether the Bonita evidence as heretofore detailed (pp. 7-8, *supra*) prejudiced petitioner even though not admitted against him, as was done in *Kotteakos* v. *United States* (1946), 328 U. S. 750, and *Berger* v. *United States* (1935), 296 U. S. 78, hereinafter discussed. Ignoring these decisions of this Court the court below concluded that there was no confusion of the Bonita and White Hat evidence and hence no prejudice to petitioner solely and simply because the defendant Pollack, involved only in the former, was acquitted, thus demonstrating the jury's ability to differentiate the evidence relevant to each.[1]

This is surely the *non sequitur* of the year since Pollack defended on the grounds of mistaken identity, as explained

1. This same argument, when made by the government in *Kotteakos*, was rejected by this Court. *Kotteakos* v. *United States* (1946), 328 U. S. 750, 767.

by the trial court to the jury (R. 4083, 4084). Thus, the jury, as to him, was not required to distinguish between the two conspiracies.

The refusal of the court below to examine into the impact on the jury of the tremendous mass of evidence relating to the Bonita conspiracy and its consequent effect on petitioner's rights places it squarely in conflict with the rule of *Berger* and *Kotteakos* and with the result in the latter.

In *Berger* v. *United States* (1935), 296 U. S. 78, a careful scrutiny was made of the record to ascertain the possibility of prejudice to the accused because of the variance there involved. In this connection this Court stated, p. 83:

> "The proof here in respect to the conspiracy with which Berger was not connected, may, as to him, be regarded as incompetent; *but we are unable to find anything in the facts—which are fairly stated by the court below—or in the record* from which it reasonably can be said that the proof operated to prejudice his case. * * *" (Emphasis supplied.)

When the *Berger* case was before the Second Circuit (73 F. 2d 280, reversed here on other grounds) Judge Learned Hand, in discussing the materiality of the variance, asked, "Will it allow the production of evidence not competent or material to the crime he has committed, although admissible against another defendant tried at the same time?" Judge Hand did then examine into and discuss whether such incompetent evidence in that case prejudiced the accused, in which event the variance would be material.

In *Kotteakos* v. *United States* (1946), 328 U. S. 750, this Court found that under the circumstances there present the variance between the charge and proof was material. It distinguished the opposite result in *Berger* on the grounds that it was one thing to hold harmless the admission of the comparatively simple incompetent evidence in *Berger* and an entirely different thing to so hold where

many conspiracies were charged involving many defendants.

This Court stated the difference between the two cases in the following fashion, pp. 766, 777:

> "Obviously the burden of defense to a defendant connected with one or a few of *so many distinct transactions, is vastly different not only in preparation for trial, but also in looking out for and securing safeguard against evidence affecting other defendants, to prevent its transference as 'harmless error' or by psychological effect, in spite of instructions for keeping separate transactions separate.*" (Emphasis supplied.)

Again this Court stated the rule to be applied in weighing whether or not a variance has permitted a transference of guilt. It said (p. 762):

> "In the final analysis judgment in each case must be influenced by conviction resulting *from examination of the proceedings in their entirety*, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations." (Emphasis supplied.)

This Court also announced the effect to be accorded the results of such an examination of the record. It stated at pp. 764-765:

> "• • • if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. *The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error, it is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.*" (Emphasis supplied.)

Certainly these cases require of the reviewing court in multiple conspiracy trials more than a brief over-the-

shoulder glance at the acquittal of one of six defendants in determining whether substantial rights have been affected.

This is particularly so in a trial that according to the trial court (R. 483, 4022, 4039) was "long and complex" (36 days) and covered 3700 typewritten pages of testimony; and in which were introduced hundreds of exhibits, some voluminous, and in which there was necessarily created, because of the multitudinous acts involved in the Bonita conspiracy, an aura of wholesale bribery and corruption which had no proper relation to petitioner. Under these circumstances, so like those in *Kotteakos*, it is unbelievable that the results in that case and this could be different if the *court below had examined into the question at all and had* not contented itself with deciding under *United States* v. *Cohen* (1944) (2nd Cir.), 145 F. 2d 82, that the conspiracies could be joined and that the instructions were proper.

B. The Decision Below Is In Conflict With Decisions of This Court That a Variance Between a Charge of One Conspiracy and Proof of Two Conspiracies Is Not Immaterial and Non-Prejudicial Merely Because the Two Conspiracies Could Have Been Properly Joined.

In *Kotteakos* this Court was critical of the predilection of the Second Circuit to determine the immateriality of variances solely on the grounds that the two conspiracies proved could properly have been joined in two separate counts.

Speaking directly of the *Cohen* case as well as to two other cases arising out of the 2nd Circuit, *United States* v. *Liss* (1943) (2nd Cir.), 137 F. 2d 995, *United States* v. *Rosenberg* (1945) (2nd Cir.), 150 F. 2d 788, this Court stated, pp. 774-775:

> "In so ruling we are not unmindful, as the Court of Appeals has held more than once that the problem is

not merely one of variance between indictment and proof or of the right application of the policy of § 269 for freedom of judgment, but is also essentially one of proper joinder under 18 USC § 557. When we look at that section's requirement for separate statement in different counts of related but distinct 'acts or transactions of the same class of crimes or offenses, which may be properly joined instead of having several indictments,' our conclusion is reinforced.

"Section 557 too is a relaxation of rules of strict regularity. When to this is added the further relaxation of § 269 for criminal causes, all technical advantage for the accused deriving not only from detailed specification of the offense in the indictment but also from separate statement of distinct offenses would seem to be lost. But this too may be carried too far. For, potentially at any rate, § 269 *carries the threat* of overriding the requirement of § 557 for substituting separate counts in the place of separate indictments, unless the application of § 269 is made with restraint. The two sections must be construed and applied so as to bring them into substantial harmony, not into square conflict."

C. The Decision Below Conflicts With Holdings of This Court in Which It Has Indicated That in All But Simple Cases the Accused Is Not Protected From the Impact of Evidence Admitted Against Others Even Though Such Evidence Is Properly Limited by Instructions.

This Court has also been critical of the second ground relied upon by the court below—that the trial court's cautionary instructions were proper. In two recent decisions it has pointed out the evil effects and prejudice to a defendant arising out of the admission of evidence limited to a co-defendant in a *one*-conspiracy case even where correct admonitions are given the jury. Mr. Justice Jack-

son expressed it in his oft repeated statement in *Krulewitch* v. *United States* (1949), 336 U. S. 440, p. 454:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal* v. *United States*, 332 U. S. 539, 559, all practicing lawyers know to be unmitigated fiction."

This Court lately in *Paoli* v. *United States* (1957), 352 U. S. 232, affirmed the judgment of conviction in a one-conspiracy case, five to four (Justices Frankfurter, Black, Douglas and Brennan dissenting). The question involved was the admission of a confession made after the termination of the conspiracy and limited to the declarant by the instructions of the trial court.

In deciding this matter, this Court stated, p. 238:

> "These declarations (*i. e.*, those admissible only as to the declarant) must be carefully and clearly limited by the court at the time of their admission and the jury instructed as to such declarations and the limitations put upon them. Even then, in most instances of a conspiracy trial of several persons together, the application of the rule places a heavy burden upon the jurors to keep in mind the admission of certain declarations and to whom they have been restricted and in some instances for what specific purposes."

The majority reasoned, however, that the cautionary instructions of the trial court were sufficient under the circumstances of the case and that the jury followed them since the one conspiracy was simple in character, the confession corroborated what the government had already established, no separate trial had ever been requested on behalf of any defendant, the confession was not introduced until the rest of the government's case was in, thus making it easier for the jury to consider the confession separately from the other testimony, and there was no mass trial and there was no multiplicity of evidentiary restrictions.

The circumstances of the trial of the case at bar were so exactly the opposite of those above-described by this Court in *Paoli* as to here compel the statement that the court below is in conflict with that decision also. They also make pertinent the observations of the minority to the following effect, pp. 247-248:

> "The dilemma is usually resolved by admitting such evidence against the declarant but cautioning the jury against its use in determining the guilt of the others. *The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a non-admissible declaration cannot be wiped from the brains of the jurors.*
>
> * * * * *
>
> "The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.
>
> * * * * *
>
> "It is no answer to suggest that here the petitioner-defendant's guilt is amply demonstrated by the uninfected testimony against him. That is the best reason for trying him freed from the inevitable unfairness of being affected by testimony not admissible against him. *In any event, it is not for an appellate tribunal, to know how the jury's mind would have operated if powerfully improper evidence had not in effect been put in the scale against* petitioner." (Emphasis supplied.)

D. The Approval of the Court Below of Equivocal and Ambiguous Instructions Permitting the Jury to Improperly Consider Evidence Is In Direct Conflict With Decisions of This Court.

In the case at bar the instructions of the trial court were far from clear and were so confused and ambiguous as to bring the court below in conflict with this Court in *Bollenbach* v. *United States* (1946), 326 U. S. 607, 612, 613 and again with *Kotteakos* v. *United States* (1946), 328 U. S. 750, 776. In *Bollenbach* it was held that a conviction ought not to rest on an equivocal direction to a jury on a basic issue. *Kotteakos* is authority for the rule that when a large number of defendants are to be tried extraordinary precaution is required not only that the instructions shall not mislead but that they shall scrupulously safeguard each defendant individually.

We point out that a large portion of the confusion necessarily arose from the fact that the trial court persisted in almost continuously instructing the jury on different theories. He instructed (1) from time to time as the government was putting in its case, (2) at the termination of the evidence for both sides and (3) after the jury had commenced its deliberations.

During the course of the trial the court vacillated between whether he would submit the case to the jury on a one- or two-conspiracy theory (R. 46, 100, 101, 114, 115, 402, 483, 539, 1536-1538, 1840, 1843-1846). He also told the jury that since a conspiracy is a partnership in crime the acts and declarations of one conspirator in furtherance of it are binding on all other conspirators (R. 101, 540) and further that if petitioner joined the conspiracy after it once commenced he was chargeable with the prior acts and declarations of the other conspirators (R. 103, 115, 402).

At the conclusion of the case the trial court instructed the jury that there were two conspiracies involved, that petitioner was not involved in the Bonita conspiracy (R. 4042, 4085) and that therefore none of the Bonita testimony and exhibits should be considered by the jury against him (R. 4042, 4053-54).

He also instructed that but one overt act (that petitioner, Rubin and Ades had held a meeting in Puerto Rico) applied to the White Hat conspiracy (R. 4094).

However, these instructions were buried and submerged in a 96-page charge, in the course of which the trial court repeatedly gave instructions from which the jury could reasonably conclude that they were free to find that petitioner was a party to a single conspiracy in which all defendants participated as charged in the indictment and that, if they so found, petitioner would be bound by the acts and declarations of every other defendant.

The confusion inherent in these instructions and the jury's failure to understand them is demonstrated by the fact that after the jury had deliberated for approximately 12 hours they returned to the court room and asked the court,

> "If a conspiracy existed on the Bonita contract and was not terminated by some act of the conspirators, does it then follow that:
>
> "(a) The conspiracy continued during the course of the White Hat contract.
>
> "(b) There had to be a conspiracy on the White Hat contract" (R. 4167)

This question indicated the inability of the jury to distinguish between the two conspiracies and their feeling that the Bonita conspiracy encompassed the White Hat contract and that therefore they would not need to find a separate White Hat conspiracy.

In reply the court instructed that if they found certain

defendants were engaged in the Bonita conspiracy they could then find that as to certain of these there was a continuing conspiracy into the White Hat transactions (R. 4168). He also again stated petitioner was not a member of the Bonita conspiracy and he could not be convicted unless the jury found him to be a member of the White Hat conspiracy (R. 4168, 4169). But he then immediately repeated his prior instruction to the effect that a conspiracy continues as long as there is an intention to continue it and that each conspirator who is the agent of the other during the life of the conspiracy remains an agent during all of its existence (R. 4169).

This last instruction completely destroyed any efforts the trial court might have made to protect petitioner from the Bonita evidence, and since it was a last minute instruction he should have given it special care since the last word is often decisive. *Bollenbach* v. *United States* (1946), 326 U. S. 607, 612. The trial court attempted to insulate petitioner from Bonita. Yet it told the jury that Bonita continued into the White Hat and therefore could be regarded as one conspiracy. The jury could then improperly conclude that all the acts and declarations of those in the continuing conspiracy in all its phases were admissible against petitioner as his agents. Significantly, within approximately one hour after this instruction, the jury convicted petitioner (R. 4177).

II.

THE COURT BELOW IS IN CONFLICT WITH A DECISION OF THIS COURT IN HOLDING HARMLESS THE ERROR OF THE TRIAL COURT DENYING PETITIONER'S RIGHT TO EXAMINE A SUMMARY OR REPORT OF A PRIOR STATEMENT MADE BY A WITNESS TO A GOVERNMENT INVESTIGATOR. FURTHER, IN GOING OUTSIDE OF THE CERTIFIED RECORD ON APPEAL TO MAKE AN EXAMINATION IN CAMERA OF A DOCUMENT PURPORTING TO BE SUCH STATEMENT OR REPORT AND OF EX PARTE AFFIDAVITS RELATING TO IT, THE LOWER COURT HAS FOLLOWED UNAUTHORIZED AND UNPRECEDENTED PROCEDURE RAISING IMPORTANT QUESTIONS IN THE ADMINISTRATION OF CRIMINAL LAWS IN FEDERAL COURTS.

The second error which was found by the court below arose out of the refusal of the trial court to order the government to produce a statement given by government witness Carlin relating to the events concerning which he had testified and which he believed he signed (R. 342). It stated in its opinion that because of this Court's decision in *Jencks* v. *United States* (1957), 353 U. S. 657 "the trial court judge was in error in refusing the order [to produce] on the ground that the defendants had not established inconsistencies between the statement and the witness's testimony." However, the court below then stated that before ordering a new trial it was necessary to ascertain whether the statement "is in any event discoverable." It finally reached the conclusion that under the new *Jencks* statute, Title 18 U. S. C., Section 3500, Carlin's statement it not now discoverable[1] because it was a "summary" of

1. The sole authority, *United States* v. *Miller* (1957), (2nd Cir.) 248 F. 2d 163, upon which the court below rested its decision on this point is most inapposite. In that case the court did not examine the statement, did not decide it was a summary ond did not decide that it was not discoverable under Title 18 U. S. C., Section 3500.

the witness's statement to a government agent which was prepared "following the interview and is not a substantially verbatim record of Carlin's statement." Accordingly, the court concluded that the trial court's error "was rendered harmless."

This holding is in conflict with decisions of this Court and misconstrues Title 18 U. S. C., Section 3500 in such fashion as to give rise to questions of great importance in the administration of the criminal laws in the federal courts.

A. In Considering a Document and Affidavits Pertaining to It Dehors the Certified Record, the Court Below Has Pursued a Course of Action Not Authorized by Statute or Custom. This Action Is Inimical to the Proper Administration of Justice.

In arriving at its decision, the court below utilized procedure which is virtually without precedent in courts of review. No statement or report of Carlin was made part of the authenticated and certified record on appeal. No such statement or report was ever exhibited to the trial court. Nevertheless, the court below considered *in camera* the contents of a sealed envelope furnished it by the prosecutor. Petitioner has never seen this document and his sole knowledge of it comes from the opinion of the court below. Compounding this peculiar and unorthodox procedure, the court below also considered an affidavit also furnished it by the prosecutor. Neither the alleged summary nor the affidavit are part of the record here, since the clerk of the Court of Appeals for the Second Circuit could certify only the trial record and appendices containing portions of the proceedings before the trial court and the judgment and opinion of the court below. It is therefore impossible at this point to determine the exact nature of the document in question.

The extraordinary and irregular character of this procedure is ironically highlighted by a recent decision of the court below in *United States* v. *Miller* (1957), 248 F. 2d 163. In that case the court below demonstrated unusual zeal in staying *within the confines of the certified record* when an excursion outside of it, as the court made here, might well have produced the reversal of a conviction. It refused to examine a witness's statement (also in a sealed envelope) found by the trial court, at a time prior to this Court's decision in *Jencks*, to be not only consistent with, but to contain matters unrelated to the witness's testimony. Holding that the trial court erred in failing to furnish the statement to the accused after excising portions of it, the court below stated (p. 165):

> "* * * but we cannot determine whether or not it was prejudicial error because the exhibit has by stipulation been excluded from the record on appeal. Since we cannot know that failure to deliver the statement, properly excised, was prejudicial to the defendant, we do not think a new trial should be ordered."

The procedure of the court below in the case at bar is improper not only because it ignores time-honored rules for preserving the authenticity and integrity of litigated issues, but also because it violates the very standards of fairness and justice which prompted this Court's decision in *Jencks* and the subsequent so-called *Jencks* legislation, Title 18 U. S. C., Section 3500.

Jencks, of course, establishes that the determination of whether an earlier statement or report of a government witness is suitable for cross-examination or impeachment should be made by defense counsel and not by the trial judge. Only the defense counsel has sufficient familiarity with his case to make this decision. Title 18 U. S. C., Section 3500 preserves this important right of defendants, but permits an *in camera* examination of the statement or

report by the trial court *only* when a claim is made by the government that it contains matter which does relate to the subject matter of the testimony of the witness. No such claim is made here; hence there is no statutory authority for an *in camera* examination either by the trial court or the court below. Where, as here, the claim is made, not that the statement contains extraneous matter, but that it is not discoverable at all, the question should be resolved, as are all other matters of discovery, by the trial court openly, with full right to a defendant to make all proper inquiry and argument. Cf. *United States* v. *Waldman* (D. C., N. J., 1958), 159 F. Supp. 747. Certainly the prosecutor should not be the sole judge of what he is willing to make available to a defendant.

The arrogation to itself by the court below, without statutory authority, of the right to make such a determination secretly and upon the self-serving affidavits of the prosecutor deprives petitioner and will, if approved, deprive others of the very rights accorded them by this Court in *Jencks* and spelled out in Title 18 U. S. C., Section 3500. This action of the court below raises important questions in the administration of the criminal law so as to require an exercise of this Court's supervision of the federal courts.

B. The Court Below Has Misconstrued and Misapplied Title 18 U. S. C., Section 350. That Statute Does Not Make Unavailable to a Defendant Summaries and Reports of Statements Made By Witnesses. In Fact, Such Summaries and Reports Are Made Available Under It. The Holding of the Court Below Is, Consequently, In Conflict With the Decisions of This Court.

The interpretation which the court below gives to Section 3500, without discussion, is as erroneous as its procedure. It assumes that Title 18 U. S. C., Section 3500 was intended to restrict the effect of the *Jencks* rule. Such is not the case. It is clear from the legislative history of this statutory provision that the legislation was intended merely to clarify the decision which had been the subject of considerable misunderstanding. S. Rep. No. 569, 85th Cong., 1st Sess. 2 (1957); S. Rep. No. 981, 85th Cong., 1st Sess. (1957); H. R. Rep. No. 700, 85th Cong., 1st Sess. (1957); 103 Cong. Rec. 9896 (July 8, 1957). Attempts of the Attorney General to limit the rule to require production of only authenticated or signed statements or reports of government witnesses "any rule of court or procedure to the contrary notwithstanding," were expressly rebuffed. S. Rep. No. 569, 85th Cong., 1st Sess. 10-11 (1957); 103 Cong. Rec. 14720 (August 27, 1957).

There is nothing in the language of the statute as enacted which justifies the conclusion reached by the court below that summaries of statements are immunized from the requirement to produce. Assuming, *arguendo*, that a summary such as here involved does not fit the description of the term "statement" provided by Sub-section (e) of Title 18 U. S. C., Section 3500, it does not follow, as the court below assumes, that such statement is exempt from production. It only follows that such a document is not subject to the procedure provided in that statute. If such

a summary may be produced under any other procedure established by rule or decision, the defendant is not deprived of that right by Section 3500. The text of Section 3500 as originally proposed by the Attorney General and which has been quoted in part was intended to have that effect, but was not adopted. S. Rep. 569, 85th Cong., 1st Sess. 10-11 (1957); H. R. Rep. No. 700, 85th Cong., 1st Sess. 15 (1957). Since under the *Jencks* doctrine, as the court below admits, the alleged summary of Carlin is subject to production, and this right is not expressly denied by Section 3500, it follows that the right still exists notwithstanding the enactment of the statute.

The conclusion that Section 3500 does not deprive a defendant of this right is substantiated by this Court's decision in *Scales* v. *United States* (1957), 2 L. Ed. 19, reversing *Scales* v. *United States* (1955) (4 Cir.), 227 F. 2d 581. In that case the court below had approved the trial court's denial to a defendant of certain reports made by the FBI to the Department of Justice. This Court, upon a consideration of the entire record and the confession of error by the Solicitor General, reversed. The reversal came after the enactment of Title 18 U. S. C., Section 3500, notwithstanding that such reports are obviously not within the definition contained in Subsection (e) of that statute. The decision below is, therefore, in direct conflict with this Court's decision in *Scales*.

Further, there is nothing in the affidavits submitted by the prosecutor to the court below—and certainly nothing in the record—which indicates that the alleged Carlin summary is not "a substantially verbatim recital of an oral statement made by said witness to an agent of the government and recorded contemporaneously with the making of such oral statement." Title 18 U. S. C., Section 3500(e)(2). Nor could the court below have reasonably reached a conclusion to the contrary without a thorough examination of

everyone involved with the preparation of the alleged summary. This, of course, the court below failed to do.

In *United States v. Waldman* (D. C., N. J., 1958), 159 F. Supp. 747, the government claimed that a report of a government agent about his interview with a witness for the prosecution did not meet the description of Subsection (e). It appeared, evidently on a hearing before the trial judge, that the government agent had taken long-hand notes while interviewing the witness, had later elaborated on these notes and had then made a transcription of his notes and elaboration in the form of a report. Judge Hartshorne, the District Judge, held that in view of the legislative history of the statute, such a report was clearly subject to production. In interpreting the meaning of paragraph 2 of Subsection (e), the court stated (p. 749):

> "Of course, by the 'substantial verbatim recital,' 'verbatim' is not meant. It need not be word for word. It need not use exactly the words of [the witness], nor mean [the witness's], words be used in their exact grammatical phrasing. That would prevent the use of any narrative statement. What is meant is, that the statement should give the substance of what [the witness] said; should give it, so far as the substance is concerned, substantially in [the witness's] words."

C. The Error Depriving Petitioner of the Right to Examine the Carlin Summary Was Prejudicial Whether or Not It Is Available to Petitioner Upon a New Trial.

The reasoning of the court below in holding the trial court's refusal to give petitioner the Carlin summary on the grounds that it would not be discoverable to him in the event of a new trial emphasizes the harmful effect of error as to petitioner.

Of course, it is evident that had the court below not erred, petitioner would have been entitled to make full use of the information therein contained in order to cross-examine a witness who gave most damaging testimony as

to the inception of the conspiracy and the manner in which it was to be carried out. In this respect, this Court's attention is called to the fact that the opinion of the court below does not contend that the summary did not contain information useful to petitioner, nor does it contend the summary contained irrelevant or extraneous matter. It seems most apparent that the error which deprived petitioner of a most valuable right can hardly be called harmless.

CONCLUSION.

The decision of the Court below opens wide the gate for mass trials of separate conspiracies with the conviction of defendants assured because of the high degree of probability of the transfer of guilt from a group to one not a member of it. The court below has not yet recognized the teachings of this Court that in complicated cases one cannot be insulated by a court's instruction from such a transfer. In effect this decision really permits one to be convicted on the acts and declarations of those with whom he has no conspiratorial association. The conspiracy dragnet is thus further widened.

In addition, it is respectfully submitted that the procedure followed by the court below, in examining *ex parte* documents *de hors* the record furnished it by the prosecutor, is shocking and deprived petitioner of basic and valuable rights. This procedure ought not to have the imprimatur of this Court placed upon it. Further, the attempt of the court below to limit the effect of this Court's decision in *Jencks* and the statute clarifying it should be vigorously rebuffed.

It is earnestly urged that this petition for Writ of Certiorari be granted.

Respectfully submitted,

ANTHONY BRADLEY EBEN,
Counsel for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS

For the Second Circuit.

No. 283—October Term, 1957.

(Argued April 29, 1958 Decided August 11, 1958.)

Docket No. 24809.

UNITED STATES OF AMERICA,

Appellee,

vs.

HARRY LEV, MARVIN RUBIN, MAURICE ADES AND RAYMOND WOOL,

Defendants-Appellants.

Before:

CLARK, *Chief Judge,* and
HINCKS and STEWART, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Irving R. Kaufman, *Judge.*

Harry Lev, Marvin Rubin, Maurice Ades, and Raymond Wool appeal from their convictions of conspiracy to defraud the United States, 18 U. S. C. § 371, and Rubin also appeals from his conviction of bribery, 18 U. S. C. § 201. Affirmed.

Arthur H. Christy, Chief Asst. U. S. Atty., S. D. N. Y., New York City (Paul W. Williams, U. S. Atty., and Fioravante G. Perrotta and Joseph T. Altier, Asst. U. S. Attys., New York City, on the brief), for appellee.

Milton S. Gould, of Gallop, Climenko & Gould, New York City (George Trosk, of Gallop, Climenko & Gould, New York City, on the brief), for defendant-appellant Harry Lev.

John T. Sullivan, New York City, for defendant-appellant Marvin Rubin.

Thomas J. Short, of Dougherty, Ryan & Mahoney, New York City, for defendant-appellant Maurice Ades.

Albert H. Treiman, New York City, for defendant-appellant Raymond Wool.

CLARK, *Chief Judge:*

Harry Lev, Marvin Rubin, Maurice Ades, and Raymond Wool appeal from a verdict and judgment of conviction for conspiracy to defraud the Government in violation of 18 U. S. C. § 371. Rubin also appeals from a conviction for bribery in violation of 18 U. S. C. § 201. The defendants were indicted for a single conspiracy to defraud the United States in the administration and procurement of Government contracts. Alleged errors involve principally a claimed variance between a charge of a single conspiracy and proof of two, and a failure to order a statement from a Government witness delivered to the defense for use in cross-examination. Ades and Wool also claim an insufficiency of the evidence, as does Rubin with respect to the bribery charge.

The proof adduced at the trial below tended to show overt acts between February 1952 and about August 1953 involv-

ing the procurement and administration of two contracts awarded to Bonita Originals, Inc., for the manufacture of Army garrison caps, and overt acts in the period commencing in April 1953 and continuing on into 1954 involving the procurement and administration of a contract awarded to Spencer Manufacturing Corporation for the manufacture of white hats for the Navy. During the former period Ades was the president and owner of 50 per cent of the stock of Bonita, Rubin was employed by Bonita on a profit-sharing basis to deal with Government officials on the garrison cap transaction, and Wool, an Army officer in the Quartermaster Corps, was assigned the Bonita contracts for administration until they were completed. Lev was not involved in either the procurement or the administration of the Bonita contracts. But Lev, Ades, and Rubin were all interested in Spencer Manufacturing Corporation and involved in the procurement and administration of the white hat contract. Wool was appointed a Contracting Officer of the Armed Services Textile and Apparel Procurement Agency (ASTAPA) prior to the award of the white hat contract and participated in both the award and the administration of that contract. On this proof Judge Kaufman, for the defendants' benefit, charged the jury that in fact two separate conspiracies were involved—the Bonita conspiracy and the white hat conspiracy—although he expressed doubts as to whether it was improper to characterize the conspiracy as a single one.

Defendants urge that a fatal variance occurred between the indictment and the proof concerning the number of conspiracies, and that this error was compounded by confusion on this point in the court's charge to the jury. A claim of variance is not unusual in a conspiracy case, *United States* v. *Rosenberg*, 2 Cir., 150 F. 2d 788, 793, certiorari denied 326 U. S. 752, and the courts have not evolved clear lines for distinguishing single and multiple conspiracy situa-

tions. Cf. *Blumenthal* v. *United States*, 332 U. S. 539; *Berger* v. *United States*, 295 U. S. 78; *Kotteakos* v. *United States*, 328 U. S. 750; *United States* v. *Cohen*, 2 Cir., 145 F. 2d 82, certiorari denied *Cohen* v. *United States*, 323 U. S. 799; *Monroe* v. *United States*, D. C. Cir., 234 F. 2d 49, certiorari denied 352 U. S 873; *Canella* v. *United States*, 9 Cir., 157 F. 2d 470. Here, although from Lev's vantage point the Bonita transaction was completely separate from the white hat transaction, from the viewpoint of the other appellants the conspiracy was a single one to defraud the Government in matters of war contracts. Thus as to Rubin, Ades, and Wool, who were involved in both transactions, there is, properly speaking, no variance. See *Canella* v. *United States*, *supra*, 9 Cir., 157 F. 2d 470; *cf. Blumenthal* v. *United States*, *supra*, 332 U. S. 539.

As Lev was involved only in the latter transaction, a more serious question of variance does arise as to him. In *Berger* v. *United States*, *supra*, 295 U. S. 78, 82, and *Kotteakos* v. *United States*, *supra*, 328 U. S. 750, 757, the Supreme Court set out the applicable rule in these circumstances: "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'effect the substantial rights' of the accused." In this Circuit the test applied has been stated as whether the conspiracies ultimately proved might have been joined in a single indictment and whether the trial was conducted so as to protect the right of defendants who are not common to all conspiracies. *United States* v. *Cohen*, *supra*, 2 Cir., 145 F. 2d 82, 89. Although Lev claims that the confusion inherent in the indictment was compounded by the court's instructions, a thorough reading of the charge shows that Judge Kaufman was scrupulous in protecting Lev's rights. In fact it is apparent that the jury was able to differentiate between the evidence relevant to defendants involved in only one of the conspiracies, for it acquitted

defendant Pollock, who was alleged to be involved solely in the Bonita affair. It follows that the variance here was not prejudicial and was at most harmless error.

Ades and Wool claim that the evidence linking them to the conspiracy was insufficient to justify admitting in evidence against them the admissions of other conspirators. Two witnesses for the prosecution gave important evidence involving particularly statements by Rubin defining and particularizing the use of funds to pay for entertainment of and gifts to the Government inspectors. These were Carlin, accountant for Bonita, and Levy, secretary-treasurer and co-owner of Bonita. Levy's testimony particularly went into details of funds drawn by him for uses which Rubin's directions and explanations to him showed were improper, definitely bringing the others, notably Ades and Wool, into the conspiracy. Hence we must consider the independent evidence supporting the inference of participation in the conspiracy and justifying the receipt of this testimony against them.

The independent evidence linking Ades to the illegal plot shows that he was present at a meeting with Rubin in the spring of 1952 where Rubin allegedly stated that he would need 5 to 7 per cent of the contract price in order to entertain Government personnel. Ades then went to Puerto Rico, where he managed the factory which manufactured the caps and hats supplied the Government. There is testimony that, while running the plant in Puerto Rico, he induced a Government inspector, Ienni, to live at his apartment rent free; that he brought another Government employee named Schlesinger to Puerto Rico secretly under an alias; that he attempted to bribe another inspector, Watkins; that he wrote a letter attempting to have Forcillo, a Government inspector, removed because he was too tough; and that, even before the white hat contract was awarded, he was bragging that they would receive it.

As to Captain Wool, the proof was that he went to visit Rubin's office several times; that as the officer supervising the procurement he granted valuable contractual deviations whenever they were requested, both in the Bonita contract and later to Lev; that he had several meetings with Lev before the opening of the bid on the white hat contract; and that as contracting officer he approved Lev's bid, although the pre-award survey showed that Lev had no machinery at all in Puerto Rico to manufacture the hats. There was testimony that in May or June 1953 Wool came to the Bonita office and took a topcoat and again, some children's dresses. There was further evidence from Rubin's doctor, Dr. Franklin, who testified that Rubin introduced Wool to him and that he treated Wool on nine separate office visits and rendered a bill for $265, which was paid by a check from the Bonita Corporation for $285 (thus including $20 for Rubin himself). Later when Rubin came to testify he said that Wool's affliction was deep-seated and of long standing, which no Army doctor had been able to reach, but which Dr. Franklin proceeded to cure by this course of treatment. This evidence stands uncontradicted on the record, and Wool (who did not testify) offered no satisfactory explanation of Bonita's making this payment for him. There was also considerable circumstantial evidence tending to show, when coupled with testimony as to statements made by an alleged coconspirator, that a month after the white hat contract was awarded Lev advanced him $5,000, which he used to complete payments on the purchase of a house. Later in testifying to a Senate committee investigating these frauds he claimed to have borrowed money and given a note to one Luciano, who denied this in testifying below. This testimony was presented by the Government to show consciousness of guilt. Thus the evidence offered as to both Ades and Wool presents amply sufficient groundwork for the admission of testimony of

statements by coconspirators and in particular for Levy's terribly devastating testimony, which, when believed by the jury, left no question of guilt.

Defendants Lev and Rubin assert that the trial court committed reversible error in refusing to order the Government to produce for their inspection a statement made by Government witness Carlin to agents of a Senate investigating committee. Since the decision in *Jencks* v. *United States*, 353 U. S. 657, we know that the trial judge was in error in refusing the order on the ground that the defendants had not established inconsistencies between the statement and the witness' testimony. But before a new trial is to be ordered, we must see if the statement is in any event discoverable. Although the statement is not a part of the lower court record, the prosecutor—who did not have it at the trial—has procured from the Senate committee and presented to us in a sealed envelope a verified copy of a Senate investigator's summary of an interview with Carlin. An additional affidavit establishes that this summary is the only written record made of Carlin's interview, and that it was written following the interview and is not a substantially verbatim record of Carlin's statement. We have examined the summary, and internal evidence from it tends also to bear this out.

While defendants may perhaps have been given a right to inspect a statement of this nature by the *Jencks* decision, *supra*, 353 U. S. 657, 668,[1] the recent codification of discovery in this situation allows a defendant to examine only the following:

1. Here the Court said: "We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F. B. I., touching the events and activities as to which they testified at the trial." While not specified, it seems inferable that the F. B. I. recording of the reports made orally was contemporaneous with the making of the oral statements.

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement" 18 U. S. C. § 3500 (e)(1)(2).

As this statute will apply on a new trial of any of these defendants, and as under it discovery of the summary cannot be required, the trial court's error is rendered harmless. *United States* v. *Miller*, 2 Cir., 248 F. 2d 163, certiorari denied *Miller* v. *United States*, 355 U. S. 905.

There remains to be discussed Rubin's contention that there was insufficient evidence for the jury to have convicted him of bribery. We think the evidence quite sufficient. There was proof that Chief Inspector Porreca, whose duty it was to assign inspectors, upon a request had removed Forcillo from Puerto Rico and replaced him with a more lenient man. Thereafter Rubin sent Porreca a deep freeze, for which Bonita paid. Porreca later received some meat to put in the freezer. He testified that he never paid for any of this, nor was he ever asked to pay for it. This was enough evidence of violation of the bribery statute, 18 U. S. C. § 201. The defense efforts to show that nothing Porreca did actually defrauded the Government are irrelevant as the statute shows.

This important trial discloses a sad and sordid picture of Government agents yielding to rather cheap temptation, some willingly, some only under pressure. But there is another side to the story, of inspectors who stood out at all times against such debauchery of their obligations and who were transferred to other activities for their pains. It is to be hoped that they received no permanent setbacks in their careers, but eventually were accorded that proper respect which they so richly merited.

Convictions affirmed.

UNITED STATES COURT OF APPEALS

For the Second Circuit.

UNITED STATES OF AMERICA,
Appellee,

-v-

HARRY LEV, et al.,
Appellants.

State of New York,
County of New York,
Southern District of New York--ss.:

ARTHUR H. CHRISTY, being duly sworn, deposes and says:

1. He is Chief Assistant United States Attorney for the Southern District of New York and, as such, is fully familiar with all the proceedings heretofore had in the above-captioned matter.

2. He was the prosecutor at the trial of *United States v. Lev, et al.*, in March and April, 1957.

3. During the course of the trial, a demand was made for a statement allegedly signed by Government witness Melvin Carlin and given to investigators of the Senate Permanent Subcommittee on Investigations, Jack S. Balaban and L. L. Poole. At the time such demand was made, your deponent did not have in his possession any signed statement by the Government witness Carlin, nor any report of an interview of Carlin by Senate investigators; nor was your deponent aware that there was in existence either a signed statement or a report of an interview.

4. Following the decision in *Jencks* v. *United States*, 353 U. S. 657, decided in June 1957, your deponent communicated with the Senate Permanent Subcommittee on Investigations to determine if the Subcommittee had in its possession a statement signed by Carlin or a report of an interview with Carlin.

5. Your deponent was advised that a search was made through the files of the Senate Permanent Subcommittee on Investigations and that no statement signed by Carlin was located.

6. Your deponent was advised that Senate investigators Jack S. Balaban and L. L. Poole had interviewed Carlin on one occasion and had prepared a memorandum for Chief Counsel Robert F. Kennedy which contained a report of their interview with Carlin. The Senate Permanent Subcommittee on Investigations advised your deponent by letter that no signed statement by Carlin could be found, and such letter is attached to and made a part of this affidavit.

7. The Senate Permanent Subcommittee on Investigations, at your deponent's request, forwarded a copy of the memorandum prepared by Jack S. Balaban and L. L. Poole. This memorandum, containing a report of an interview with Carlin, was prepared on March 17, 1955, by Jack S. Balaban and L. L. Poole. A copy of the memorandum furnished by the Senate Permanent Subcommittee on Investigations has been signed and dated by Jack S. Balaban and it is contained in a sealed envelope attached hereto and made a part of this affidavit. It may, of course, be opened by the Court for inspection.

8. Investigator, Jack S. Balaban, who interviewed Carlin has signed an affidavit stating that, to his knowledge, no signed statement was ever taken from Carlin and that the memorandum prepared by him following his interview with Carlin is the only one in the files of the

Senate Permanent Subcommittee on Investigations relating to an interview with Carlin. Balaban's affidavit is attached hereto.

/s/ ARTHUR H. CHRISTY

Sworn to before me this
4th day of April, 1958.

/s/ Jack Ballen
JACK W. BALLEN

Notary Public, State of New York
No. 41-0146400, Queens County
Term Expires March 30, 1959

State of New York,
County of New York,
Southern District of New York—ss.:

JACK S. BALABAN, being duly sworn, deposes and says:

1. He is an investigator employed by the Office of Comptrolier General of the United States and assigned to the Senate Permanent Subcommittee on Investigations of the United States Senate Committee on Government Operations. He has been so employed since 1935.

2. In his position as investigator, he was assigned to work on the investigation by the Subcommittee into the fraudulent practices in textile procurement in the military services, which investigation culminated in Hearings before the Subcommittee in 1955.

3. In the course of his work on the investigation into the procurement of certain garrison cap contracts awarded to Bonita Originals, Inc. in June, 1952, he had occasion to interview Melvin Carlin, a certified public accountant at 11 West 42 Street, New York, New York. Carlin was an accountant for Bonita Originals, Inc. With him at

this interview was another investigator of the Subcommittee, L. L. Poole.

4. Your deponent and L. L. Poole interviewed Carlin, whom your deponent is advised was a Government witness in the case of *United States* v. *Lee, et al.*, tried in the Southern District of New York in March and April, 1957, in Carlin's office in March of 1955.

5. This was the only interview your deponent recalls having with Melvin Carlin and, upon information and belief, it is the only interview investigator L. L. Poole had with Carlin.

6. At no time did your deponent obtain from Carlin a signed statement and, upon information and belief, at no time did L. L. Poole obtain a signed statement from Carlin.

7. L. L. Poole resigned as an investigator for the Senate Subcommittee in 1958 and his whereabouts are presently unknown to your deponent.

8. Following the interview with Carlin in March, 1955, your deponent prepared for Robert F. Kennedy, Chief Counsel of the Subcommittee, a memorandum of the interview with Carlin. In this memorandum your deponent summarized generally what Carlin had related to your deponent and L. L. Poole. This memorandum was not adopted nor approved by Carlin, nor is it a substantially verbatim recital of an oral statement made by Carlin.

9. This memorandum was prepared on March 17, 1955, and is the only memorandum prepared by your deponent in connection with the interview by your deponent and L. L. Poole with Carlin and is the only memorandum your deponent knows of in the files of the Subcommittee.

10. On this day, your deponent was shown a copy of the memorandum he and L. L. Poole prepared following

the interview with Carlin. Your deponent has signed his name and the date on each of the three pages of this memorandum.

/s/ JACK S. BALABAN

Sworn to before me this
4th day of April, 1958.

/s/ Jack Ballen
JACK W. BALLEN

Notary Public, State of New York
No. 41-0146400, Queens County
Term Expires March 30, 1959

[Letterhead of]

UNITED STATES SENATE.

Committee on Government Operations
Senate Permanent Subcommittee on Investigations
(Pursuant to S. Res. 37, 85th Congress)

March 25, 1958

Mr. Arthur H. Christy
Chief of the Criminal Division
Southern District of New York
U. S. Court House
Foley Square
New York, New York

Dear Mr. Christy:

A check has been made of all references in the possession of this Subcommittee concerning Melvin Carlin and no record has been found of any interrogatory or interview other than that of Jack Balaban. I trust that this is the information you desire.

Very truly yours,

/s/ DONALD F. O'DONNELL
Donald F. O'Donnell
Acting Chief Counsel

UNITED STATES COURT OF APPEALS
For the Second Circuit.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of August, one thousand nine hundred and fifty-eight.

Present:

Hon. Charles E. Clark, Chief Judge.
Hon. Carroll C. Hincks, Circuit Judge.
Hon. Potter Stewart, Circuit Judge.

United States of America,
Plaintiff-Appellee,
vs.
Henry Lev, Marvin Rubin, Maurice Ades and Raymond Wool,
Defendants-Appellants.
Joseph G. Porreca, Eric C. Farnell, Mella Hort, David Pollack and George A. Earnshaw,
Defendants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk.